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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING CO.,
Petitioners

vs.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

and

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL No. 610, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties before the National Labor Relations Board, seek a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit which dismissed petitioners' appeal by affirming the adverse judgment of the district court.

OPINIONS BELOW

The unreported order of the Court of Appeals affirming the judgment of the District Court is reproduced at A 148.

The unreported order of the District Court denying petitioners' motion to accept and consider their objections to the Stipulation previously approved by that Court, and for an order rescinding or amending such Stipulation, is reproduced at A 139.

JURISDICTION

The final order of the court below sought to be reviewed was entered on December 17, 1971.

The adverse ruling of the district court, from which petitioners sought review in the Court of Appeals, was entered on October 12, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the courts below deprived charging parties before the National Labor Relations Board of rights guaranteed them in Section 10(l) of the National Labor Relations Act by refusing to accord them an evidentiary hearing on their objections to the remedial adequacy of a settlement of their meritorious charges which the Board's agents negotiated in lieu of securing the injunctive relief provided for in Section 10(l).

a) Whether charging parties, required to evaluate the remedial adequacy of settlements proposed by the Board's agents in lieu of the statutorily-afforded injunctive relief, may be denied information secured by the Board's investigation, not otherwise available to the charging par-

ties, concerning the scope and kind of unlawful conduct uncovered.

b) Whether a settlement of the charging parties' meritorious charges without affording the injunctive relief provided in Section 10(l) is remedially adequate or sufficiently protects the public interest when it fails to permit the charging parties, should the terms of the settlement be breached, unilaterally to move the district court to set that settlement aside and grant injunctive relief pursuant to the Regional Director's still pending injunctive petition.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*, are set forth at A 149.

STATEMENT OF THE CASE

The facts which gave rise to this case (hereinafter referred to as "Solien IV") also gave rise to the Eighth Circuit's previous decisions in *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F. 2d 124 (CA 8, 1971), (hereinafter referred to as *"Solien I"*); *Terminal Freight Handling Co., et al.* v. *Solien*, 444 F. 2d 699 (CA 8, 1971), (hereinafter referred to as *"Solien II"*); and *Sears, Roebuck and Co., et al.* v. *Solien*, (Nos. 20,462, 20,472, CA 8, November 3, 1971), (hereinafter referred to as *"Solien III"*). The interrelationship among these matters can be seen from the facts (1) that the errors complained of here were committed in the same district court deliberations which, on review of a different part of the court's decision, became *Solien I;* and (2) the assertion of denied rights which underlies this appeal stems from the existence of guarantees which were articulated for this first time by the court below in *Solien II.* Thus, a resolution of this appeal requires the application of *Solien II* to those district court proceedings.

On June 10, 1970, Local 610, Miscellaneous Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, commenced picketing the premises of Terminal Freight Cooperative Association and Terminal Freight Handling Company [1] and achieved a nearly total cessation of their business.

On June 12, 1970, Terminal filed an unfair labor practice charge (Case No. 14-CC-604) with Respondent Regional Director Solien against Local 610, charging that Union with engaging in an unlawful secondary boycott in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act. (A 11) More specifically, Terminal accused the Union, with which Terminal had no labor dispute, of unlawfully picketing their facilities in order to force them to cease doing business with Sears, Roebuck and Co. and other stranger members of the Cooperative Association. As the aggrieved victim of the described secondary boycott activity, Terminal also desired the protection of the relief specifically provided by Congress for such persons in Section 10(l) of the Act:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) . . . (B) . . . of section 8(b) . . . the preliminary investigation of such charge shall be made forthwith and given priority over all other

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[1] Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of approximately forty independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and tran-shipment of freight as manager of the Association at more than forty terminals throughout the United States.

For ease of reference, these petitioners jointly will be referred to as "Terminal" herein.

> cases . . . in the office where it is filed. . . . If, after such investigation the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition in a district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition, the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . ."

On June 16, 1970, the Regional Director concluded, as a consequence of his investigation of Terminal's charges, that he in fact had reasonable cause to believe the Union had committed the charged violations of law. Approximately two weeks later, on June 29, 1970, the Regional Director did finally petition the district court for injunctive relief (A 1); the Union had continued its unlawful picketing throughout the period of the Director's delay, resulting in substantial injury to Terminal.[2]

Throughout this period, the Director had carried on unilateral negotiations with the Union, resulting in a "Stipulation" which the Director's agents circulated to Terminal for its approval. (A 15). The Director and the Union intended this Stipulation to serve in lieu of the injunctive relief for which the Director had earlier petitioned. To the end of achieving such an informal agreed settlement in lieu of the injunction which Section 10(l) commanded the Director to seek, the Director failed to seek an order to show cause which would have resulted in a hearing on the petition which he had filed.

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[2] The propriety of the Director's extended delay in seeking injunctive relief, despite his previous conclusion that there did exist the requisite "reasonable cause", constituted, in part, the subject matter of *Solien II*.

Terminal,—believing that the remedial provisions of the Stipulation were inadequate and desiring an opportunity to influence its contents rather than merely to be unwilling recipients of such an informal, inadequate, privately negotiated, non-self-enforcing agreement,—on July 7, 1970, filed specific and detailed Objections to the proposed Stipulation in the district court in which the injunction petition was pending. (A 20, 23)

A hearing was conducted in the district court on July 7, 1970, in which (i) the Director sought the court's approval of the Stipulation in lieu of injunctive relief; (ii) Terminal argued its "Motion to Interdict Entry Of and Objections to Proposed Stipulation"; and (iii) Terminal sought an order granting it "party" status in the proceedings or, alternatively, leave to intervene.[3] (A 26)

On July 8, 1970, the district court disapproved the proffered Stipulation, also holding that Terminal did not constitute a party to the Section 10(l) proceedings and would not be allowed to intervene although it was permitted the exercise of certain lesser rights, including the right to be informed of all actions taken in the case and to be present by counsel at all hearings.[4] The court also set the matter for hearing, on its own motion, for July 15, 1970. (A 39)

However, on July 9, 1970, representatives of the Director and the Union proffered an amended Stipulation to the district court judge in his chambers. (A 41). The

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[3] Throughout the proceedings in the district court, Terminal was joined in its contentions by Sears, Roebuck and Co., also a charging party before the Board aggrieved by comparable conduct of the Union to that to which Terminal had been subjected. The decisions of the district court applied equally to Terminal and Sears.

[4] The district court's decision denying Terminal the right to participate as full parties-litigant or, alternatively, to intervene in the district court proceedings was appealed to the Eighth Circuit which, on March 12, 1971, affirmed the decision of the district court. (*Solien* I). A *writ of certiorari* was sought and was denied on July 7, 1971 (No. 1588, October Term 1970); reh. den., November 15, 1971.

judge approved that Stipulation without Terminal's presence, without any advance notice to them that such a meeting was to be held, without affording them an opportunity to participate in the drafting of the document, without curing the defects previously protested and without affording them an opportunity to state any further objections to it. Terminal learned of the meeting and the court's approval of the amended Stipulation only after those events had transpired. Moreover, the court's approval of that Stipulation had the effect of cancelling the scheduled hearing of July 15, preventing Terminal from filing prepared Interrogatories and from submitting evidence to the court, either in support of the Director's still pending petition for injunctive relief or for other relief which they deemed necessary to protect their vital and legitimate interests. Finally, the court's action violated its own order of July 8, which guaranteed Terminal the right to notice of all proceedings in the case and the right to participate therein, and violated their right, expressed in Section 10(l), to a hearing at which they could "appear by counsel and present any relevant testimony" in connection therewith.

On July 2, 1970, the Regional Director formalized his conclusion that the Union had committed the charged violations of law by issuing an administrative "Complaint and Notice of Hearing". (A 61). Instead of proceeding to a full hearing on its Complaint, the Board sought to dispose of the underlying case by means of a "Settlement Stipulation" purporting to remedy the charged unfair labor practices. (A 69). The charging parties (Terminal and Sears, Roebuck and Co.) opposed such a disposition of their charges on the grounds that they lacked sufficient information to judge whether all the substantive violations had been remedied, that they had not been afforded any opportunity to participate in the negotiation or drafting of this proposed settlement, and that the document lacked any findings of fact such as are required under Section 10(c) of the Act and without which it would be impossible

to determine whether any resumption of the Union's picketing would violate the presumed proscriptions of the settlement.[3] (A 81, 92, 97)

The Regional Director's approval of the Settlement Stipulation over the charging parties' objections was affirmed by the General Counsel on March 19, 1971. (A 88, 95, 127). Since that date, the matter has remained pending and unresolved before the Board. (A 130, 132, 133). Accordingly, there has been no "final adjudication of the Board" in this case which would terminate the relief guaranteed aggrieved charging parties under Section 10(l). Therefore, the only outstanding relief for the charged unfair labor practices in this case is that afforded or approved by the district court, on whose docket this case has remained—and still remains today—awaiting the Board's "final adjudication".

At the time of the district court's initial deliberations in this case, Terminal's participatory role was circumscribed by the will of the court. Terminal was held to lack the status of a party and the standing to intervene in proceedings arising under Section 10(l) and, as a presumed corollary, it lacked the right to seek review of adverse district court decisions. However, the Eighth Circuit's recent decision in *Solien II* effected a substantial change in this situation as it recognized Terminal's *right*, as a charging party, to an independent access to the district court in order to pursue a result opposed by every other person in the suit.

Terminal's dissatisfaction with the district court's treatment of its objections to the Stipulation approved there, as well as the level of participation permitted by the court, together with the newly-recognized *right* to a full hearing in the district courts on such objections, led to its filing on September 13, 1971 of a "Motion To

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[3] The charging parties sought to establish the validity of their opposition to the manner in which the Settlement Stipulation was arrived at, as well as to its contents, in *Solien III*.

Accept and Consider Their Objections To The Stipulation Previously Approved By The Court Herein and For an Order Rescinding or Amending Such Stipulation." (A 43)

Following the receipt of oppositions to that Motion from both the Director and the Union (A 52, 56), the district court, on October 12, 1971, denied Terminal's motion without explanation or comment. (A 139)

Terminal appealed the action of the district court on November 2, 1971 (A 140). In the Court of Appeals, both the Union and the Regional Director filed motions to dismiss. (A 142, 146). On December 17, 1971 the court entered an order granting the Union's motion and affirmed the judgment of the district court. (A 148). No reasons or other explanation for its decision were stated by the court.

REASONS FOR GRANTING THE WRIT

This case arises out of the same need to secure a judicial definition of charging parties' statutory rights under Section 10(l) as gave rise to *Solien I* and *Solien II*. Indeed, this case, Solien IV, is a consequence of the holdings of its predecessors. In Solien I this Court declined to review the Eighth Circuit's decision that charging parties do not constitute "parties" in district court proceedings arising under Section 10(l),—although this Court has twice before granted certiorari in cases raising the same or similar contentions only to hold them to be "moot" without reaching the merits.[6] In *Solien II*, currently before the Court on a Petition for Writ of Certiorari (No. 71-609), the Eighth Circuit recognized the existence of rights guaranteed to charging parties in Section 10(l) which are typically associated only with "party" status. Thus, despite the absence of such status, under the holding in *Solien I* charging parties appear to have the right, in district court proceedings under Sec-

[6] *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U.S. 655 (1970); *The Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

tion 10(l), to be present by counsel, examine and cross-examine witnesses, offer and respond to motions, introduce documentary or other relevant matter into evidence, and file briefs. Pursuant to the subsequent decision in *Solien II*, charging parties appear to have the additional rights to object to settlement of their cases when they deem the terms of the settlement to be remedially inadequate and independently to move the district court to set such a settlement aside and grant injunctive relief pursuant to the Director's pending injunction petition. The question then emerges as to the respect in which the exercisible rights of charging parties differ from those of "parties" generally; *Solien I* holds that they do, whereas the totality of described rights flowing from the two cases carries a contrary implication. The search for a definition of the rights which flow from Section 10(l), which characterizes all of the "Solien" cases, has perhaps been complicated by an unnecessary emphasis on labels. Whether charging parties' status in Section 10(l) suits should be described as that of a "party", or as something different or wholly new in the law, is itself immaterial except to the extent that the label describes a status which is understood generally. The failure to accord charging parties the status of "parties," together with courts' failure,—because of this primary emphasis on labels,—systematically to define the rights which do flow from the statute, has given rise to the confusion which has produced all the Solien cases and which has not as yet been resolved by them.

In the instant case, the petitioners' participation in the initial Section 10(l) proceedings was circumscribed by the unclear limits described in *Solien I*. Whether the holding in *Solien II* entitled them to a greater participation was the issue below. Its resolution by this Court, particularly in conjunction with the resolution of the issues posed in the pending Petition in *Solien II*, will eliminate the described confusion which has afflicted the area of charging parties' rights under Section 10(l).

A. Petitioner-Terminals' Participatory Rights Under Section 10(l) Were Significantly Enlarged by Solien II

In *Solien II*, the court below rendered a decision of first impression which recognized the right of charging parties to proceed unilaterally to a district court for the purpose of objecting to settlements or Stipulations which had been negotiated in lieu of injunctive relief under Section 10(l) of the National Labor Relations Act. In granting them the right to seek to overturn or amend such Stipulations, the court conferred upon charging parties a status or standing entitling them to be heard and imposed on the district courts a correlative duty to consider the views they express, neither of which had been judicially recognized at the time the district court originally approved the subject Stipulation in July, 1970.

Accordingly, in the Motion filed in the district court on September 13, 1971 to accept and consider objections to that Stipulation, Terminal exercised statutory rights which were not judicially articulated until *Solien II* issued on June 18, 1971. To the extent Terminal had previously urged objections to that Stipulation in the district court, it was not done under the umbrella of such statutory right and, similarly, the response of the court thereto was not governed by the existence of the specific statutory duty imposed by *Solien II*. Thus, the court below did not rule upon the merits of any of the objections previously made, which rulings, prior to *Solien II*, were presumably not considered by the lower court to be required. Yet such rulings are essential if, for example, charging parties are to be afforded an opportunity for the effective exercise of appellate review which the granting, in *Solien II*, of defined statutory rights in the district courts presupposes.

Therefore, Terminal sought in the Motion filed below, such a judicial response to its exercise of the rights granted in *Solien II*.

More specifically, at the time of the original proceedings in the district court, the measure of Terminal's rights was circumscribed by the court's conclusion that it was not a party and could not intervene. The level of its participation was a function of the court's reading of the language of Section 10(l) providing that charging parties "shall be given an opportunity to appear by counsel and present relevant testimony". Pursuant to that language, Terminal was allowed to file with the court written objections to the Board's proposed Stipulation, to appear in court to oppose the approval of the Stipulation and, by order of court, to be notified of all actions by the Board and the Union, to appear at hearings, to file briefs and advise the court of pertinent matters. However, immediately following the entry of that order, the Board and Union proposed an amended Stipulation to the court *without* notice to Terminal; a hearing was conducted in the judge's chambers *without* notice to Terminal and, hence, *without* its participation; the amended Stipulation was approved *without* affording Terminal an opportunity to state further objections or to file those briefs or other documents to which the court's order referred, and *without* affording Terminal the opportunity to present to the court relevant *factual* data which would support the objections which had previously been filed. No evidentiary hearing having been held, no facts were before the district court other than the conclusionary facts which were contained in the injunction petition. Additionally, no findings were made by the court, no rulings on the objections were issued and no record was made to facilitate appellate review.

Whatever disagreement Terminal had with these procedures, in the absence of "party" status or the right to intervene, or of a judicial holding that some statutory right had been breached, no recourse appeared available. Indeed, the absence of recourse was underscored by the Board's assertion, subsequently repeated and *rejected* in *Solien II*, that the determination as to when or whether injunctive relief should be sought under Section 10(l) was

within its unreviewable discretion as was the decision as to the contents of any compromise Stipulation.

When the court below rendered its decision in *Solien II* almost a year afterward, but while the challenged Stipulation remained in effect, the basis for such recourse appeared. In rejecting the Board's described assertion of unreviewable discretion and recognizing charging parties' statutory right to invoke, independently and unilaterally, the jurisdiction of the district court to protest inadequate settlements, the court, in effect, disapproved the procedures of the district court. The right to a judicial hearing cannot be satisfied by procedures which either exclude the beneficiary of that right from being present when his vital interests are adjudicated or which in any other manner limit his ability to present relevant facts or arguments.

Similarly, insofar as *Solien II* acknowledged the standing of charging parties, such as Terminal herein, to apply to the district courts for appropriate and adequate relief in proceedings under Section 10(l), it also by logical implication conferred standing to appeal those courts' adverse judgments. The recognition of an independent *right* to request appropriate relief in the district court carries with it the implication that an erroneous denial of that request by the court should be subject to appellate review. As long ago as this Court's decision in *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, it was recognized that:

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

Therefore, if the value of a right of access to the district courts is not to be nullified, and in conformity with the principle that appellate review is only an *extension* of the proceedings to be reviewed, the granted right to invoke the jurisdiction of the district court under Section 10(l) would appear to carry with it the right to seek review

of its decision.[7] Moreover, if the right to seek appellate review of such adverse district court decisions is added to the other rights which were either stated or implied in *Soliens I* and *II*, any distinction between the totality of such rights and those of a "party" becomes, at best, obscure.

Accordingly, *Solien II* established both that the level of participation permitted Terminal in the initial Section 10(1) proceedings represented less than their statutory entitlement and that they have standing to protest such a limitation both in the district court itself as well as in the appellate courts. The refusals of both the district court and the court below to entertain such protests were, therefore, erroneous.

B. Terminal's Objections To The Stipulation Approved By The District Court Involve Necessary Extensions Of Rights Granted In Section 10(l)

To the extent that the court below may have declined to reverse the district court's refusal to grant Terminal's Motion to accept and consider its objections on the ground either that Terminal lacked the right or standing to urge it or that the full consideration and participation sought had already been accorded, then the court was in error for reasons which have been stated above.

To the extent the court's unexplained decision may have been predicated upon the belief that Terminal's objections to the Stipulation lacked merit, it is contended that the court was similarly in error. The objections raised in the Motion describe respects in which the execution and

[7] Such a result is not inconsistent with the holding in *Solien I* that charging parties in Section 10(l) cases do not constitute "parties," even assuming that decision was correct. The right to seek appellate review has been granted to those who may not be "parties" to the proceeding, but whose substantial interests are adjudicated or affected therein. *Association of Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159.

approval of the Stipulation resulted in improperly diminished protection of the interests required by Section 10(l) to be safeguarded as a result of the Director's conclusion that Terminal had been subjected to an unlawful secondary boycott.

1. *Absence of Information*

Neither Terminal nor the court below is now or has ever been armed with sufficient information to judge whether the Stipulation executed herein by counsel for the Regional Director and Respondent Union constitutes a full and adequate interim remedy for the violations of law which were uncovered by the Regional Director pursuant to the charges which were filed by Terminal. Evidence obtained from Respondent-Union's witnesses was not available to or discoverable by Terminal; no hearings were conducted in this case which would have revealed the full scope either of the Respondent-Union's unlawful activities or those of other unions which may have assisted the Respondent and thereby incurred the duty to remedy their own misconduct; and the Director at no time disclosed to Terminal the nature of the violative conduct which his investigation uncovered and which was purportedly remedied in the challenged Stipulation.

Since the right to object becomes meaningful only to the extent that charging parties possess sufficient facts to formulate intelligent and encompassing Objections, and since, in the absence of some disclosure by the Director of the nature and scope of his investigation, the full range of such facts was necessarily unknown to Terminal. Therefore, the failure of such disclosure constituted an insurmountable impediment to the exercise of the right, granted in *Solien II*, to frame objections in the district court.

Both the courts and Congress have been increasingly sympathetic to the proposition that those whose rights and interests are in legal jeopardy are entitled to the

fullest disclosure of facts which might aid them in their protection. In both *Leeds & Northrup Co.* v. *N. L. R. B.*, 357 F. 2d 527 (CA 3, 1966), and *Concrete Materials of Georgia, Inc.* v. *N. L. R. B.*, ___ F. 2d ___, 76 LRRM 2832 (CA 5, 1971), the courts held that charging parties before the Board are entitled to an *evidentiary* hearing on their objections to the Board's administrative settlement of their meritorious cases. In *Leeds & Northrup*, the entitlement was unlimited; in *Concrete Materials*, it was restricted to objections raising "material issues of disputed fact". In either event, the right to such hearings, with the attendant right, through cross-examination, for example, to secure the fullest record to support the charging parties' objections, evidences judicial concern for full factual disclosure. Moreover, the court's qualification, in *Concrete Materials*, that the objections raise "material issues of disputed fact" carries with it the natural implication that the charging parties are entitled to full factual disclosure by the Board in order to determine whether such a dispute exists.[8] Indeed, an awareness both of the beneficial consequences of full disclosure by governmental agencies and the need to assure it has found expression in the Freedom of Information Act, 5 U.S.C. Section 552 (Supp. II, 1965-66); 5 U.S.C. Section 552 (1970). This Congressional enactment, like the judicial decisions above, constitutes, at the very least, persuasive policy support for Objection 1. The recent decision in *Julius G. Getman, et al.* v. *N. L. R. B.*, ___ F. 2d ___ (No. 71-1097, CA DC, August 31, 1971), constitutes a judicial exclamation point

[8] In *Solien III*, the substantive issue raised by the charging parties involved their need for and entitlement to factual disclosure by the Board of the results of its investigation in cases initiated by their charges. That case sought a determination, *inter alia*, as to whether the Board's agents may settle an unfair labor practice case without making a fact disclosure to the charging parties of the product of its investigation, thus preventing those charging parties from making a full and informed assessment of the remedial value of the proffered settlement. The general principles urged by the charging parties in *Solien III* apply equally to proceedings under Section 10(l).

to this statement of policy as the court there made clear that the specific and limited exceptions to the Information Act are to be most narrowly construed.

Finally, no great burden would be imposed on the Board, its personnel or its processes by a requirement that it make the factual disclosure referred to in Terminal's Objection. Such a requirement does not presuppose an effort to discover inter-agency memoranda or other internal deliberations nor to examine the affidavits of any prospective witnesses nor even to be informed as to the identity of any such witnesses. Rather, the information which is needed to make the right to object meaningful consists only of (i) the evidentiary facts uncovered by the Director's investigation which support his belief that the law was violated, many of which facts could not otherwise be known by charging parties; (ii) those facts which were alleged by the charging parties which the Director does not believe to be true or relevant or verifiable; (iii) the theories upon which the Director proceeds; (iv) the relief which the Director seeks, as well as his reasons for refusing to seek other relief which the charging parties may have urged.

At present, charging parties such as Terminal are entitled, in the Board's view, only to that information which is found in the "Complaint" or the injunction petition filed by the Director, which consists of conclusionary facts and mere summary allegations that the law was violated. Terminal believes that informed and intelligent judgments as to the adequacy of proposed Stipulations cannot be made without a fuller disclosure of information without which charging parties would be unable to propose more appropriate, more reasonable and more useful alternatives or to formulate informed objections.

2. *The Limitation of Access to the District Court*

Terminal further objected to the Stipulation approved by the district court because it failed to recognize or to

confer upon Terminal the right unilaterally to move the district court, should the Respondent Union breach the terms of the Stipulation, to set that document aside and grant injunctive relief pursuant to the Director's previously filed and still pending petition. Rather, the exclusive right to move in such a situation was granted to the Board.

Under the terms of the Stipulation, as it was approved by the court, should the Respondent Union breach its commitments therein, Terminal was not permitted to bring this charge directly to the district court for expeditious hearing and resolution, but was required, instead, to bring the facts to the attention of the Board's Regional staff and thereafter to wait, without relief, (i) while the Region investigated the matter pursuant to a schedule of its own selection, (ii) engaged in an administrative decision-making procedure concerning the merits of the charges, (iii) obtained such authorization to proceed to the district court as it concluded was administratively necessary or advisable, (iv) secured affidavits to its satisfaction, and (v) then proceeded—*if* in *its* discretion *it* elected to do so—to the district court.

Accordingly, Terminal objected to the subject Stipulation since it imposed this wasteful and unnecessary procedure which substantially vitiated whatever protection against a resumption of unlawful picketing the Stipulation would otherwise afford. Moreover, this procedure constitutes a violation of Terminal's rights, as a charging party before the Board, as these rights were recognized in *Solien II*.

Since, as *Solien II* provides, charging parties may judicially challenge settlements which they deem to be inadequate, it follows that they should be accorded an equivalent right with respect to an adequate settlement which they believe has been breached. In such a situation, Congress' desire to afford protection to neutral employers subjected to unlawful strikes and boycotts requires that

they be permitted independent access to the district court for the purpose of urging the court to grant or reinstate an injunction as a consequence of the breach of the settlement agreement or Stipulation. Inasmuch as charging parties, through *Solien II*, have standing independently to invoke the process of the district court to urge the granting of the pending injunction petition when the picketing has ceased and the dispute centers only on the adequacy of the remedial provisions of the settlement, then, *a fortiori*, they should similarly be permitted to invoke those processes where the picketing has resumed in violation of the terms of the Director's attempted settlement.

The question of charging parties' right to do so is, moreover, of great practical importance.[9] For example, when such a breach occurs, the potential for injury is such that time is of the essence. However, to compel the charging parties to proceed through the inherently time-consuming offices of the Board assures delay, particularly where,—as often deliberately happens,—the breach occurs during periods when Board personnel, unlike district court judges, is unavailable to offer the needed assistance or cannot readily and expeditiously secure the needed administrative authorization to proceed.

The restriction of a charging party's direct access to the district court in the event of a resumption of picketing in favor of such an unfortunate and unnecessary procedure,—which the subject Stipulation now imposes,—is inconsistent both with the existence of the statutory rights

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[9] That importance is underscored by the fact that the number of unfair labor practice charges filed with the Board which allege conduct for which Section 10(l) affords an injunctive remedy is very large and constitutes an increasing percentage of the total charges filed. Thus, of the unfair labor practice charges filed against unions during the Board's fiscal year 1969, over 2100 charges, or 32%, involved alleged violations of Section 8(b)(4). This represents an increase of 13% over the 8(b)(4) charges filed in fiscal 1968. (*Thirty-fourth Annual Report of the National Labor Relations Board*, p. 13 (1969).)

recognized in *Solien II* [10] and with Congress' purpose that proceedings under Section 10(l) should guarantee the greatest protection from the violative conduct which that Section was designed to remedy. *Cf. Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F.2d 525 (CA 9, 1965).

CONCLUSION

For the foregoing reasons, and in reliance upon the authorities cited, it is urged that the instant Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[10] The court's language in *Solien II* recognizing charging parties' right to urge the district court to overturn a Board-negotiated settlement which "fails to adequately protect the public interest" is not limited to the period prior to the settlement's approval. Such "inadequacy" may result from the terms of the document itself or from conditions subsequent which render a once-adequate remedy now inadequate. A breach of the settlement or Stipulation is such a condition subsequent which compels a different and stronger form of relief in order "to adequately protect the public interest." A Stipulation, like that involved in the instant case, which expressly limits access to the district court in the event of a breach except to the Board, apparently violates the teaching of *Solien II* that, as a construction of the statute, such access is also available to charging parties.

Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-925

TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING CO.,
Petitioners,

vs.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

and

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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